TESTIMONY ON H.R. 1013

THE INTELLIGENCE OVERSIGHT AMENDMENTS

OF 1987

Before the House Permanent Select Committee
On Intelligence,
Subcommittee on Legislation

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Submitted by:

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It is an honor to be asked to testify before the the Subcommittee on Legislation of the House Permanent Select Committee on Intelligence on the issues concerning strengthened legislative oversight of intelligence activities addressed in the proposed legislation, H.R. 1013. I have been asked to focus on oversight matters that I directly experienced during the period I served as Staff Director of the Senate Intelligence Committee.

As Staff Director of the Committees in both the investigative phase and the later oversight mode from 1975-1981, I served under five chairmen. I was involved directly in negotiations leading to oversight guidelines under Executive Order, agency regulation as well as the statute passed in 1980 known as the Intelligence Oversight Act of 1980, which modified the so-called Hughes-Ryan amendment and added a new section to the National Security Act of 1947.

I have served in both the Legislative and Executive Branches: First, as a Foreign Service officer and, later, as a senate staff aide working on foreign policy and national security issues during seven administrations of both parties. I know how difficult it has been to find an effective and constitutionally sound balance between the competing requirements of the Executive and Legislative Branches in the area of secret national security activities.

I do not have to remind this Committee that secret activities are among our country's most difficult problems of governance. In a time when we are all worried about the loss of secrets through traitors, espionage and spy-wars, we find ourselves in the curious legal situation of not yet having clearly defined statutes which allow us to determine what should be classified as secret. We do not have a classification system defined by law. We do have espionage laws -- some few areas of protected

information such as communications intelligence and names of agents. Freedom of Information Statutes, under certain circumstances, release to the public information judged upon review to be no longer sensitive.

From a legal point of view and from the perspective of those in government who must plan, decide, undertake, oversee or evaluate "secret activities", the very foundations are shifting and uncertain. Perhaps the ebbs and flows of perceptions of danger to our country's national security are so great and so devoid of consistent pattern that statutes which cover most circumstances cannot be written. I know these are issues which this Committee and others in the Congress have to grapple with continually. But they are, nonetheless, issues that remain unresolved and underlie some, if not all, of the difficulties you have experienced in trying to exercise effective, constitutionally appropriate oversight of intelligence activities.

In a fundamental way, the Oversight Act of 1980, and the amendments you now are considering in H.R. 1013 are a part of the pattern of statutory efforts to build a sound system within our constitutional framework of divided powers and shared responsibilities, for the governance of what we call secret activities. They represent what some constitutional scholars call "framework legislation." That is, they are attempts to establish through statutes agreed-upon processes and use those procedures to create a constitutional balance between the coordinate branches of government.

The key to controlling secret activities -- the requirement for the governance and control of secret power is -- in the first instance an awareness of the activity. There is no possibility of policy discussion, consultation, approval or limitation, unless the activity proposed is made known. The guts of the oversight process contained in the Intelligence Oversight Act of 1980, concerns three essential factors-

- first, what information shall be transmitted; secondly, who in the Congress shall be informed, and thirdly, when, the proper parties should be made aware of the covert plans. The 1980 statute is a conscious attempt to prescribe the obligations of the Executive and the Legislative Branches with regard to the knowledge about secret activities which, in the language of the act:

> " are the responsibility of, are engaged in, or are carrried out for or on behalf of any department, agency, entity of the United States."

Information about secret intelligence activities to be reported to Congress, was intended to be all-inclusive, whether these activities were conducted by the CIA, the White House, or some ad hoc group's basement. The activities were to be reported whether they were performed by employees of the government directly or indirectly, or by other governments, directly or indirectly on our behalf, or by private individuals or groups.

It should be emphasized again that the drafting of the Intelligence Oversight Act of 1980 was a joint effort by the Legislative and Executive Branches. This attempt to arrive at a consensus between the two branches, was a conscious, agreed upon process, carried out over five years with the approval of two presidents (one from each party), a succession of Secretaries of State, Defense, Directors of the CIA, DIA, NSA, FBI, the leadership of both Houses of Congress and a series of committee chairmen as well as a broad spectrum of Congressmen and Senators. The introduction of statutes governing oversight was deferred by agreement until there had been considerable interaction between the Oversight Committees and the Executive Branch and a trial run in a series of Executive Orders, promulgated by Administrations of both parties. These Executive Orders were jointly drafted by the appropriate members and staff of both branches. Without such a joint process, and a reasonable period of testing and experimentation, it was the shared view that a

statute on so sensitive a matter as secret activities affecting the national security should not be passed. There had to be agreement between Presidents, the national security departments, agencies and entities, and the overwhelming majority of both houses of Congress that the process would meet the needs of both branches and would do so in a constitutionally appropriate way before such a bill should be brought before the Congress.

The basic premise of the 1980 Intelligence Oversight Act is that our Constitution provides means for the Legislative Branch to give its advice and views to the Executive Branch on any and all matters of public policy. This applies particularly to areas of great sensitivity that can affect the security, reputation or integrity of the nation, or require the expenditure of funds and the use of personnel or facilities. There was an overwhelming consensus in 1980 that meaningful consultation between the Branches was a prerequisite for sound policy and effective constitutional government. The Constitution provides for a system of divided powers, but also prescribes ways that the two coordinate branches should work together. There was also a recognition in 1980 that meaningful consultations, advice, and the possibility for sound policy, which would receive long-term support required awareness of a proposed activity before it takes place. There was also an awareness that some actions would have to be taken in response to unforeseen events, and are of necessity reactive, and therefore must be taken quickly and in a protected environment, and as a consequence consultation and deliberation may be foreshortened or in some cases impossible. This latter point shows the necessity of having established rules of procedure in such a sensitive area of government activity as secret operations.

I would like to turn to the first issue of what categories of information were to be made available by the Oversight Act. The Congressional view held throughout the period of negotiations was that all intelligence information should be available to the Congress. The dominant initial arguments, advanced by some in the Executive Branch, that there were certain categories of information so sensitive that Congress should not have access to them, were quickly disposed of. After careful consideration of actual cases and a series of hypothetical circumstances, and the experience of the oversight process over several years, it was accepted by both branches that Congress had a right to any and all categories of information. There was one hypothetical case developed that helped define the outer limits of access, the so-called "mole in Ruritania" example. In this imaginary case, a source has suddenly become known to the President alone by means external to the U.S. and known to the President alone. This source holds the key to the survival of the U.S., and because of a complicated series of circumstances the President cannot inform anyone else about the source's information without risking the destruction of both the source and the United States, In this extreme, improbable case, it was agreed the President had a constitutional duty not to inform anyone else, including Congress. But if the circle of knowledge could extend with safety by one or two people beyond the President, the exclusion of Congress would no longer apply. It was agreed that there was no valid way of institutionally conferring more loyalty or security on a White House aide than on a House leader or a committee chairman. Constitutionally, it was argued, once the circle was widened beyond the President himself, the Legislature had as much right to the information as the Executive branch. It was recognized, however, that some areas of activity required maximum care and protection, by both branches: such as sources, methods and the details of ongoing operations.

The fundamental and most difficult issue between the Congressional Oversight Committees of the Congress and the Executive Branch concerned the issue of when information would be supplied. As early as 1975, during the period of the investigation of the intelligence agencies, prior notice of all covert actions was a requirement and the actual practice. In 1974, the Hughes-Ryan amendment required the President to report all operations in foreign countries "to the appropriate committees of Congress" (which was determined to be eight committees) in "timely fashion." As a practical matter, after the establishment of permanent Oversight Committees in the House and the Senate, in 1976 and 1977, all covert actions were reported to the two Committees prior to their implementation and the other committees were informed as was required by particular circumstances. Part of the trade-off between the two branches, arrived at in the statute, was the agreement to reduce the formal reporting requirement to only the two Intelligence Oversight Committees in return for a clear expression of the obligation of the Executive Branch to report any and all information concerning intelligence activities in a manner and at a time required by the Oversight Committees.

The principles in the Intelligence Oversight Act of 1980 that define when intelligence information should be supplied should be discussed.

The first principle, known as the right of complete access, is the requirement of the Executive Branch, through the Director of Central Intelligence, to keep the Committees "fully and currently informed of all intelligence activities which are the responsibility of, are engaged in by, or are carried out for or on the behalf of any department, agency or entity of the United States...."

The realm of intelligence covered was intended to be all encompassing and is so expressed. The phrase "fully and currently" has a long history. It goes back to Section 202 of the Atomic Energy Act of 1946 which created the Joint Committee on Atomic Energy. That committee was kept fully and currently informed of any and all information pertaining to atomic energy matters. How fully and how currently was determined by the Joint Committee itself, which provided funds for all such activities. The history of that Committee amply documents how the power of the purse authority was used to assure that the Committee was informed in accord with its wishes.

In certain indicated categories such as covert action and significant collection programs, the Oversight Committees require, in their second principle, that they be informed before actions were undertaken. It was understood that other categories of intelligence activity that required prior notice might be added from time to time. For example, the Intelligence Oversight Committees now require prior notice of any prospective use of the contingency fund. There are also a number of areas in which the intention of making transfers of funds require that the Committee be informed before such actions are taken.

The particular complicated language of section 501 (1)(A) was developed by Senator Howard Baker, then a member of the Intelligence Committee who held the view that while it was constitutionally proper to compel the Executive Branch to inform the Congress before an anticipated activity, there was no constitutional power to compel the President to obtain approval before acting.

Section 501 (1)(B) was intended to deal with a few very sensitive issues of vital importance that required extremely careful handling. In these very few cases the access could be limited to the "gang of eight." It was believed that

extraordinarily fragile operations like the Iran rescue attempts were the kinds of activities that might fall into this category.

"Timely fashion" as it was used in section 501 (b) was intended to deal with those situations in which it was not possible to inform the Congress because the appropriate committees or members could not be contacted. In these very few cases which were believed to be, at the time of the drafting, rare or even hypothetical, a time delay was never intended to be built-in. On the contrary, this after-the-fact reporting was to take place as soon as possible. The possiblity of a delay of more than a few hours was never contemplated. Neither was there envisioned the need for a delay of forty-eight hours, and certainly not one of eleven months.

In sum, therefore, the Executive Branch was required to report all intelligence activities as follows:

a) All covert actions and significant collection activities would be reported prior to implementation.

b) If the actions were of such a vital nature and so urgent that they had to be undertaken even though Congress was not informed because it was physically impossible to get word to the appropriate committees or members, such actions had to be reported as soon as possible thereafter. A built in time delay was not the intention, of the Act.

c) All other intelligence activities were to be reported as required by the committees "fully and currently." This meant most activities would be reviewed in the normal

process of the consideration of the budget. Reports on particular activities could be required in accordance with particular circumstances and such reports could include prior notice for a broad range of activities. A good example is a release of funds for certain specified activities that are now part of the budget process.

It was always understood that new initiatives in any aspect of intelligence activities, if they had important or vital implications for policy, cost or risk would be reported before they were carried out.

During the six years I was Staff Director, I was involved in all of the discussions, negotiations, and drafting of the key understandings, Executive Orders and statutes at issue. Procedures were developed to assure that members could be contacted at all times, that secure facilities and security procedures existed and that the Committees' requirements for information were fully understood. It took work and constant rigor to assure that the requirements were being met. As Admiral Turner has already testified, the Executive Branch withheld information on three aspects of the Iran rescue effort. When post-mortems on these operations were studied by Committee members, it was the view of an overwhelming majority that there was no convincing reason why the Intelligence Committee Chairman could not have been informed or deemed at least as trustworthy as the considerable number of Executive Branch officials who were aware -- including several White House officials not directly concerned with intelligence activities. The view was then expressed that consultation and advice can only be given if the time and occasion are available. After the fact advice is of little value.

Consultation, of course, means many things. There is an all too familiar kind of consultation in which the Executive informs Congress at a point when the decision or action has already been taken. This kind of "consultation" is, at best, a kind of record keeping.

There is a second type of consultation which could be likened to taking the temperature. Selected, usually sympathetic Senators or Congressmen are informed in a private way about the direction of administration policies. The purpose of "consultation" in these instances is to get advice on the likely reaction of Congress to policies or decisions that they will in fact have no part in determining.

Finally, there is full consultation, which means fully discussing an issue with a microcosm of the Congress and seeking advice and reactions before a policy is decided. In most cases this means a committee. A good example where real consultation can take place is the notice on covert action programs of the CIA, which is given to the intelligence Committees prior to their implementation.

Turning to H.R. 1013. Under its provisions, it is proposed to strike from the preamble the phrases which do nothing more than affirm that both the Legislative and Executive Branches have rights and duties under the Constitution. In my view there would be no substantive loss or gain by striking the language. But there are reasons which were seen as important at the time for the inclusion of the language.

Striking (b) of section 501 might clarify what has become, apparently, a confused reading of what was intended.

The new (e) prepared for section 501 creates a built in time delay of forty-eight hours and would open up a loop-hole where one did not exist before. If you want to give advice and to engage in real consultations, I would not specify a forty-eight hour time period to defer reporting. I suggest, rather, that you modify (e) to reflect an obligation to report "as soon as possible and in no case later than forty-eight hours". The appropriate committees or congressional leadership can be reached within hours of any foreseeable circumstance except possibly during an all out nuclear war. I would make it clear that the obligation is to report in writing immediately, or as soon as possible thereafter. Further, I would make this requirement clear through legislative history, committee reports, floor colloquy and written understandings between the leaders of the Congress and the White House, incorporating appropriate procedures.

The strength and integrity of our democratic constitutional system depends upon an informed President, Congress and public. Secret intelligence activities pose a very difficult problem of governance for our open democratic society. It has taken over forty years to develop a reasonably workable system controlling secret activities that fits within our constitutional framework of accountability, divided power and shared responsibility. The National Security Act of 1947 which created the powerful, vast structure of secret activities our nation now possesses is the first legislative great milestone in the post World War II national security era. The Intelligence Oversight Act of 1980 which sought to bring the great power of secret intelligence activities under congressional review in a constitutionally appropriate and reasonably systematic accountable way is a second crucial enactment passed by the Congress and signed by the President to protect our freedoms. I am sure that the members of the committee who have such great responsibilities for assuring that our country has the means necessary to protect our liberty from enemies both foreign and domestic will

continue to seek more effective ways to maintain the constitutional balances crucial for the preservation of our democracy.